BRB No. 99-0360 BLA

BUFORD PATRICK)
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Claimant-Petitioner)
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v.)
)
CLINCHFIELD COAL COMPANY) DATE ISSUED:
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Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Amended Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Buford Patrick, Lebanon, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Amended Decision and Order (98-BLA-1149) of Administrative Law Judge John C. Holmes denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). The administrative law judge noted that claimant had filed previous claims[1] and considering entitlement pursuant to 20 C.F.R. Part 718, concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability pursuant to 20 C.F.R. §718.204(c). Amended Decision and Order at 2-4. Accordingly, benefits were denied. On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and are in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v.*

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[1]The record indicates that claimant filed his initial claim for benefits on September 17, 1976. Director's Exhibit 28. The claim was denied on October 18, 1979. Director's Exhibit 28. Claimant filed a second claim on May 23, 1994, which was finally denied on October 4, 1994. Director's Exhibit 29. Claimant took no further action until he filed the present claim on March 7, 1997. Director's Exhibit 1.

Director, OWCP, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. The administrative law judge, in the instant case, permissibly determined that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge, after noting that the record contained three positive readings and twelve negative readings, rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) as the preponderance of the x-ray readings by radiologists was negative. Director's Exhibits 9-12, 21, 27-29; Employer's Exhibits 1-3; Amended Decision and Order at 3; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*). In addition, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) as there is no biopsy evidence of record. Amended Decision and Order at 3. Moreover, the existence of pneumoconiosis cannot be established in this case by methods not specifically discussed by the administrative law judge, as this is a living miner's claim filed after January 1, 1982, and there is no evidence of complicated pneumoconiosis in the record. 20 C.F.R. §§718.304, 718.305, 718.306; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

The administrative law judge also considered the reports of Drs. Iosif, McSharry and Forehand and properly found that the opinions were insufficient to establish pneumoconiosis as no physician opined that claimant suffered from pneumoconiosis or that coal dust contributed to any impairment.[2] Amended Decision

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[2]In reviewing the evidence of record, the administrative law judge failed to consider the opinion of Dr. Villamin who examined claimant on March 15, 1977. Director's Exhibit 28. Dr. Villamin opined that claimant suffered from hypertension and that he had possible chronic bronchitis due to his coal mine employment based on claimant's history only and that there was no significant respiratory impairment. Director's Exhibit 28. A remand is not required, however, as this opinion is equivocal with regard to the existence of pneumoconiosis and does not state that claimant is totally disabled. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988);

and Order at 3; Director's Exhibits 7, 27, 29; *Clark, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry, supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) as it is supported by substantial evidence and is in accordance with law.

Campbell v. Director, OWCP, 11 BLR 1-16 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

With respect to 20 C.F.R. §718.204(c), the administrative law judge, in the instant case, properly found that total disability pursuant to Section 718.204(c)(1)-(2) had not been established, since all of the pulmonary function and blood gas study evidence of record produced non-qualifying values.[3] Amended Decision and Order at 3; Director's Exhibits 6, 8, 27-29. Additionally, the record indicates that no physician diagnosed cor pulmonale with right sided congestive heart failure pursuant to Section 718.204(c)(3). *Newell v. Freeman United Coal Mining Co.,* 13 BLR 1-37 (1989). Moreover, the administrative law judge properly found that no physician of record opined that claimant was suffering from a totally disabling respiratory or pulmonary impairment and thus the administrative law judge rationally concluded that the medical opinion evidence is insufficient to establish total disability pursuant to Section 718.204(c)(4).[4] Amended Decision and Order at 3-4; Director's Exhibits 7, 27, 29; *Tackett v. Cargo Mining Co.,* 12 BLR 1-11 (1988); *Fields, supra*; *Budash, supra*; *Gee, supra*; *Perry, supra*. The administrative law judge is empowered to weigh the medical opinion evidence of record and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish total disability pursuant to Section 718.204(c), as it is supported by substantial evidence and is in accordance with law.

Inasmuch as claimant has failed to establish the existence of pneumoconiosis and total disability, requisite elements of entitlement pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded.[5] *Trent, supra*; *Perry, supra*.

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[3]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

[4]Dr. Forehand opined that claimant had no respiratory impairment. Director's Exhibit 7. Dr. McSharry opined that claimant had no respiratory impairment and that from a respiratory standpoint, claimant could continue his coal mine employment. Director's Exhibit 27. Dr. Iosif opined that claimant had no respiratory impairment and that he was totally disabled due to his coronary artery disease. Director's Exhibit 29. Although not considered by the administrative law judge, Dr. Villamin opined that claimant had no significant respiratory impairment, and thus, his opinion is insufficient to meet claimant's burden of proof. Director's Exhibit 28; *Larioni, supra.*

[5]Inasmuch as we affirm the denial of benefits based on the administrative law

Accordingly, the administrative law judge's Amended Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

judge's consideration of the merits, we need not address the duplicate claims issue in this case. 20 C.F.R. §725.309; *Lisa Lee Mines v. Director, OWCP [Rutter],* 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).